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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 363

LUCY C. SIMONS,
Petitioner,

vs.

MIAMI BEACH FIRST NATIONAL BANK,
as Executor of the Estate of
SOL SIMONS, Deceased,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MARION E. SIBLEY AND
IRVING B. LEVENSON,
Attorneys for Respondent
605 Lincoln Road
Miami Beach, Florida 33139

E. L. MIDDENHALL, INC., 1108 Oak Street, Kansas City, Mo. 64106, HArrison 1-3030

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STATEMENT OF THE CASE

This case arises out of the Circuit Court of the Eleventh Judicial Circuit of Florida, in and for Dade County. The petitioner was the plaintiff in the trial court and the appellant in the District Court of Appeal, in and for the Third District of Florida, and petitioner seeking a discretionary writ of certiorari from the Florida Supreme Court. Respondent was defendant, appellee, respondent respectively

below. The parties shall be referred to by their appropriate designations in this Court.

Pursuant to United States Supreme Court Rule 21, the petitioner elected to file a single copy of the transcript of record with the Clerk of this Court and not serve a copy of that record upon respondent. Petitioner notified the respondent that she forwarded to this Court "one printed copy of *the record* recently pending in the District Court of Appeal of Florida, Third District, in Case No. 63-201", which respondent takes to mean that the entire record on appeal has been presented to this Court. The following symbols shall be employed:

"TR" for Transcript of Record.
"PX" for Plaintiff's Exhibit.
"DX" for Defendant's Exhibit.

Respondent is constrained to restate the case and facts since petitioner's presentation is riddled with inaccuracies and statements that are unsupported by the record.

The petitioner, in 1946, instituted separate maintenance proceedings in New York. In 1947, the New York court awarded her a separate maintenance decree allowing her support money. In November, 1951, Sol Simons became a domiciliary of the state of Florida. On November 17, 1951, he executed a lease for an apartment at 1110 Venetian Way, Miami, Dade County, Florida, and, thereafter, executed eight (8) successive leases covering the years 1951 through 1959, with the last expiration date on November 30, 1960, a month after his death in October, 1960. All nine (9) leases were admitted into evidence as DX B. Sol Simons declaration of domicile and citizenship, which was filed among the public records of Dade County, Florida, expressly stated that he became a permanent resi-

dent of Dade County, Florida, in November, 1951, and was admitted into evidence as DX A. Sol Simons formed a Florida corporation known as Fruit Sales, Inc., on November 19, 1951. Composite exhibit DX H containing the original corporate charter and annual corporate reports, filed with the Secretary of State for the State of Florida for the period 1951 through 1960, reflect that Sol Simons was the president and a director of that corporation, residing at 1110 Venetian Way, Miami, Dade County, Florida. Mr. Simons' accountant, Sidney Wasserman, testified that Sol Simons became his client in November, 1951, and was advised by him what Mr. Simons had to do as a Florida resident with respect to the field of accountancy. Mr. Wasserman testified that Sol Simons filed his 1952 estimated federal income tax return in Florida and all subsequent tax returns here (Tr. 786-87). Those income tax returns for the years 1952 through 1960 were admitted into evidence as DX J. Subsequent to the death of Sol Simons, his last will and testament was offered for probate in the County Judges' Court, in and for Dade County, Florida, and letters testamentary were issued naming respondent as executor of the Estate of Sol Simons, deceased. The petitioner filed an election to take dower in the Sol Simons Estate pending in the County Judges' Court, in and for Dade County, Florida, and expressly stated under oath that Sol Simons "died while a resident of Dade County, Florida". A certified copy of that election to take dower was admitted into evidence in this case as DX R.

Sol Simons, on March 11, 1952, after having been a domiciliary of the State of Florida for a period in excess of ninety (90) days (as required by the then applicable statutes of the State of Florida) instituted suit for divorce against the petitioner. In strict compliance with the constructive service statutes of Florida, the defendant, in the

original divorce proceeding was served constructively with process. The petitioner admits that she received the notice of publication and bill of complaint in the original divorce proceeding. The transcript is peppered with that admission typical of which is the following (Tr. 682):

> "Well, I got notice that he had advertised in a Jewish newspaper in Miami that he was suing me for divorce and I was so startled."

The petitioner candidly admitted at the trial in this cause that she based her decision to ignore the Florida divorce proceedings upon advice of New York counsel. Her testimony in that regard reads as follows (Tr. 698-99):

> "Q. Who is Mr. Allan, an attorney you consulted about this notice immediately after you received it?
>
> A. Oh, yes. I called him. I'm sorry.
>
> He said there is no validity to that. He said, 'Pay no attention to it.'
>
> Q. Mr. Allan told you after you received the notice that you were being sued for divorce, that it had no validity in New York?
>
> A. Yes, sir.
>
> Q. And told you to pay no attention to it?
>
> A. Yes, sir.
>
> Q. He also told you, did he not, that New York did not recognize Florida divorces?
>
> A. Well, I had no divorce at the time.
>
> Q. That is what Mr. Allan told you, did he not?
>
> A. Yes.
>
> Q. So, after Mr. Allan told you to ignore it, that it meant nothing, New York did not recognize Florida divorces, you put it away and forgot about it?
>
> A. That's right."

The entire record of the original divorce proceeding was admitted into evidence in this case as PX 3. The chancellor

in the original divorce proceedings appointed a special master to take testimony and report his findings of fact and conclusions of law to the court. Those findings and conclusions read as follows:

"Findings of Fact and Conclusions of Law.

1. The Bill of Complaint is legally sufficient and states a cause of action.

2. The plaintiff has, by competent and corroborated evidence, established that he is a bona fide resident of the State of Florida, and has been such resident for more than ninety (90) days prior to the 11th day of March, 1952 (tt. 2, 3, 4, and 6).

3. The plaintiff has proved by his corroborated testimony the grounds for divorce alleged in his Bill of Complaint (tt. 6, 7, 8, 9, 10, and 11).

4. There were no children born as a result of this marriage.

5. There are no property rights to be adjudicated herein."

On April 30, 1952, a final decree of divorce was rendered by the Circuit Court of the Eleventh Judicial Circuit, in and for Dade County, Florida, which ratified and confirmed the special master's report in every particular and dissolved the bonds of matrimony between the petitioner, Lucy Simons, and the now deceased, Sol Simons.

Ten (10) years later, on February 23, 1962, after Sol Simmons had died, the petitioner filed in the Circuit Court of the Eleventh Judicial Circuit, in and for Dade County, Florida, an original bill in the nature of a bill of review seeking to annul and vacate the final decree of divorce which had been rendered on April 30, 1952. Her attack in the court of rendition upon the final decree of divorce was based on the following four (4) alleged grounds:

1. That Sol Simons in the original divorce proceeding concealed the fact that a New York separate maintenance decree had been previously granted to her;

2. That Sol Simons falsely and fraudulently claimed to be a bona fide resident of Dade County, Florida, for 90 days preceding the institution of the divorce suit;

3. That the final decree of divorce showed lack of jurisdiction on its face because it mistakenly recited that defendant had filed an answer; and

4. That after she received notice of the pending Florida divorce proceeding her husband lulled her into inaction.

The trial court's findings of fact in this cause, upon which a final decree of dismissal was entered, were as follows:

(1) "In my opinion, the evidence is wholly and totally insufficient to destroy the presumption of correctness of the divorce decree. I think the burden is upon the person who attacks it, and I think the evidence falls remarkably short of it." (TR. 846).

(2) "I discount completely and entirely the statement that Mrs. Simons made as to the friendly relationship between her and her husband, because of the letter she wrote him saying that there is no reason why he should hate her like he does. That is in Defendant's Exhibit P." (Tr. 846).

(3) "The exact date has not been stated but she stated she had this conversation over the telephone with Mr. Simons about the pendency of the divorce suit, and the next day she and her sister went out to see him."

"The Clerk's certificate showed that the notice was mailed from the Clerk's office on the 14th day of March. Presumably, she would not have received it before the 16th, and more likely the 17th, depending upon the day of the week, and there is testimony that the man was here dictating to two people at that time." (TR. 846-7).

(4) "On this, she was lulled into a false sense of security.

Her testimony does not gibe with the facts, because she has not said when it was. But she said it was a day or two after she got it.

They were dealing at arm's length. He was angry with her, because she had brought these proceedings to increase the alimony, and she had to have it done legally. But she had nothing done legally about stopping the divorce here.

After she talked to him, she went to a man who said that the Florida divorce was no good. The attorney may have given her a false sense of security.

From the evidence here, I do not think Mr. Simons did, and I discount her testimony as to their conversation. I do not think it is true." (Tr. 848).

On appeal, the dismissal of the attack upon the ten (10) year old divorce decree was affirmed. Regarding the first two (2) stated grounds of attack upon the divorce decree, the District Court of Appeal, in and for the Third District of Florida, held that, under settled precedent in Florida, those issues were such that they could and should have been litigated in the original divorce suit. Similarly, that any affirmative defenses that petitioner had should have been asserted in the divorce suit, and that the prior New York separate maintenance decree was not a bar to a

divorce suit, and the husband's failure to disclose its existence in the complaint was not a fraud on the court. The decision of the District Court of Appeal, sought to be reviewed in this proceeding, on these points, reads as follows (Petitioner's Appendix 2-3):

> "By choosing not to appear in the Florida divorce suit the non-resident wife was precluded from filing suit years later to set aside the decree for matters which could have been litigated by her in defense of the divorce suit. She had due notice and opportunity to contest the husband's allegations as to his jurisdictional residence and his asserted ground of divorce. If she had defenses to those matters it was her duty to assert them in the divorce suit, and the chancellor was eminently correct in holding she was not entitled to maintain the present suit to set aside the decree for those reasons. Mabson v. Mabson, 104 Fla. 162, 140 So. 801; Bernstein v. Bernstein, 160 Fla. 579, 36 So.2d 190; MacFadden v. Muckerman, Fla. App. 1959, 116 So.2d 448.
>
> The prior New York separate maintenance decree was not a bar to a divorce suit by the husband, and his failure to disclose it in his complaint was not a fraud on the court. Matsis v. Matsis, 155 Fla. 786, 21 So.2d 545; Bernstein v. Bernstein, supra. Any affirmative defense the prior suit may have afforded should have been presented in the divorce suit. See Prall v. Prall, 58 Fla. 496, 50 So. 867, 26 L.R.A., N.S., 577; Bernstein v. Bernstein, supra; Gordon v. Gordon, Fla. 1952, 59 So.2d 40; Stone v. Stone, Fla. App. 1959, 111 So.2d 486; Taylor v. Taylor, Fla. App. 1961, 130 So.2d 115."

Regarding the third prong of the attack upon the ten (10) year old divorce decree, namely, that it displayed want of jurisdiction on its face because it incorrectly recited that the defendant answered, the District Court of Appeal succinctly pointed out, as it had been proven in the trial court,

that there was no mistake by the original chancellor in the divorce proceeding since the decree adopted and ratified the master's report which did contain a finding in favor of jurisdiction and recited the details in the body of that report establishing the prerequisite jurisdictional facts plus strict compliance with the constructive service of process statutes. The holding of the District Court of Appeal on this point reads thusly (Petitioner's Appendix 3):

> "The basis for the contention that the decree showed want of jurisdiction on its face was because it incorrectly recited the defendant had answered. But the record indicates the chancellor was under no misapprehension as to nature and status of the case before him on final hearing. This is so because the master's report, which the court confirmed, showed the true situation in detail."

Pertaining to the last ground upon which the petitioner attacked the divorce decree, namely, that after she personally received notice of suit by publication, her husband lulled her into inaction. The District Court of Appeal held that the chancellor decided that issue on conflicting testimony and that the ruling was adequately supported by the evidence. The District Court of Appeal's holding on that point reads as follows (Petitioner's Appendix 3-4):

> "The appellant's claim that the husband, in 1952 after she had notice of his divorce suit, lulled her into inaction, was properly denied by the chancellor, for her delay (Barnes v. Willis, 65 Fla. 363, 61 So. 828), and on the merits. That issue was tried before the chancellor in the instant case, in the course of which it was required that he judge the credibility of witnesses and resolve conflicts in the evidence, and his ruling thereon is adequately supported by the record."

Conspicuously absent in the petition filed in this cause is any attempted compliance with United States Supreme

Court Rule 23 1(f). Petitioner has strategically avoided compliance with that rule because she cannot demonstrate that the now alleged federal question was timely and properly raised so as to give this Court jurisdiction to review the decision of the District Court of Appeal, in and for the Third District of Florida. No federal question, much less the one now asserted, was raised in either the Florida trial court or the Florida appellate court. This case was, as the above quoted recitations from the opinion sought to be reviewed demonstrate, decided strictly on state issues.

ISSUE

Whether or Not a New York Separate Maintenance Decree Precludes a Florida Divorce Decree Based on Constructive Service of Process That in No Way Alters or Affects Such Prior New York Decree?

ARGUMENT

A New York Separate Maintenance Decree Does Not Preclude a Florida Divorce Decree Based on Constructive Service of Process Which in No Way Alters or Affects Such Prior New York Decree.

This case is an attack upon a ten (10) year old divorce decree in the state of rendition. It in no way involves the questions that were involved in the two *Williams* cases (*Williams* v. *State of North Carolina*, 317 U.S. 287, 63 S. Ct. 207, and 325 U.S. 226, 65 S. Ct. 1092). The question is entirely one of state law. The decision of the District Court of Appeal, in and for the Third District of Florida, sought to be reviewed is based on long settled precedent in the State of Florida. It is a basic and permanent part of the jurisprudential panorama of Florida that spouses

served constructively with process in divorce litigation may not ignore that process with impunity and wait until after a final decree of divorce becomes absolute and passes into repose by the lapse of time allowed for the taking of appeals to litigate issues which could have been raised in the original proceeding. This is simply another way of saying that a final decree may not be challenged for intrinsic factors after the time for the taking of an appeal has expired. The decision of the District Court of Appeal sought to be reviewed is based on the Florida Supreme Court's decisions in *Mabson* v. *Mabson*, 104 Fla. 162, 140 So. 801; *Matsis* v. *Matsis*, 155 Fla. 786, 21 So.2d 545; *Bernstein* v. *Berstein*, 160 Fla. 654, 36 So.2d 190; and many others which need not be treated. In the *Mabson* case, *supra*, the Supreme Court of Florida was faced with a divorce suit instituted by a husband in which the wife was served constructively. The wife left the husband to take up residence in New York. She admitted (as the petitioner admits here) that she received notice of suit but contended it was procedurally defective. The wife failed to exhibit her original bill in the nature of a bill of review raising the objection until seven (7) years after the decree had been rendered. In the meantime, she litigated in New York, based on personal service on the husband, the question of support money. It appears that when the wife received the notice of the Florida divorce proceeding, she discussed it with her New York lawyer and, apparently, decided to ignore the Florida proceeding. In the instant case, that is exactly what the petitioner did and the chancellor found that she was lulled into inaction by her New York attorney and not her former husband. The rule enunciated in the *Mabson* case is best expressed in the language adopted by the Florida Supreme Court in its syllabus under headnote 6 at 140 So. 801, which reads thusly:

> "6. Where the defendant is actually served with process which may be defective in form, or subject to the objections that may be waived by the defendant, the defendant can not with impunity ignore the actual service of the kind of notice which he has received, but must ordinarily submit his objections in this regard to the court from which the process issued, in order to take advantage of them."

Mabson stands for the proposition in Florida that an original bill in the nature of a bill of review will not lie to test procedural defects where notice is received and ignored. Moreover, *Mabson* establishes that notice plus intentional disregard of pending proceedings constitutes an estoppel against a bill in the nature of a bill of review to vacate a final decree of divorce. That rule was stated in these words (140 So. at 805-806):

> "Without adjudicating the legal effect of the publication as made of the process in the divorce suit against the complainant in this cause, she should not be permitted to maintain this suit because of her conduct. It appears from the complainant's bill in the nature of a bill of review that she received from the clerk of the court, under the statute, notice of the pendency of the divorce suit against her and had reasonable opportunity to present therein her defenses and claims for alimony, but intentionally refrained from asserting her rights in the Florida court and proceeded with her suit in the courts of New York, which courts held that her claims should have been presented to the courts of Florida. Under such circumstances, equity will not entertain a bill in the nature of a bill of review brought by the complainant to challenge the validity of a decree entered by the Florida court in a divorce suit against the complainant, of which she had notice and an opportunity to be heard, but intentionally omitted to assert her claims as to matters now sought to be presented for adjudication."

In *Matsis* v. *Matsis, supra,* the Supreme Court of Florida held that a wife who intentionally refrained from contesting a divorce suit in Florida, after having received notice, could not maintain an original bill in the nature of a bill of review to set aside the final decree of divorce nine (9) months after its rendition on the ground that the husband committed fraud by concealing and not alleging prior unsuccessful divorce proceedings in New Hampshire or on the ground that the evidence of the grounds for divorce was insufficient and uncorroborated. The significance of the *Matsis* case is twofold: (1) It establishes that neither failure by a husband to allege prior unsuccessful marital litigation nor insufficiency of proof to establish grounds for divorce are appropriate grounds for an original bill in the nature of a bill of review to set aside a final decree of divorce; and, (2) That a wife who has received notice of the proceeding but refrains from contesting is estopped to assail the final decree after the expiration of the appeal period. The pertinent language of the Florida Supreme Court's holding in the *Matsis* case reads as follows (21 So.2d at 546):

> "It is our view that there is no equity in the bill, and that the motion to dismiss should have been granted. The allegations of the bill of complaint show not fraud but an attempt by the wife to relitigate issues which should have been presented in the original suit and which have been foreclosed by the entry of the final decree and the lapse of the statutory time within which to take an appeal. If the decree entered in the New Hampshire court did in fact constitute a bar to any subsequent suit by the husband on the same issues, it was Mrs. Matsis' duty to assert such defense in the original suit in timely manner, if she cared to avail herself of such defense. See Harrison v. Harrison, 19 Ala. 499. If the evidence offered by Mr. Matsis to sustain his bill was insufficient, the place to have made

> the objection was in the original suit; there being at least some evidence offered by the plaintiff in the original suit to prove his cause of action. Having intentionally refrained from asserting her defenses or contesting the issues in a suit in which she had due and legal notice and an opportunity to be heard, Mrs. Matsis may not now be heard to question the final decree in this collateral proceeding instituted after the time for appeal has expired. —citations omitted—"

It will be observed that the Florida Supreme Court made particular note of the fact that the prior marital litigation in New Hampshire was defensive and should have been alleged and proven by the wife in the original proceeding. To the same effect is the case of *Bernstein* v. *Bernstein, supra.* In *Bernstein,* the Florida Supreme Court stated (36 So.2d at 191):

> "The suit for support and maintenance is not a bar to a suit for divorce. —citation omitted— It may be expedient in a bill for divorce to recite the fact of proceedings in a foreign court for support and maintenance if they are in esse, but that is not essential to the sufficiency of the bill for divorce. Such proceedings are matters of defense and the chancellor is at liberty to deal with them as the circumstances may seem meet, since he has acquired jurisdiction of the plaintiff."

It was upon these authorities and others that the District Court of Appeal, in and for the Third District of Florida, based its holding that the petitioner did not have grounds upon which to predicate her original bill in the nature of a bill of review assailing the bona fides of residence and the nondisclosure of the prior marital litigation in New York. She (the petitioner), after having received notice of the Florida divorce litigation elected to ignore that proceeding on the advice of her New York lawyer.

She could well have litigated at that time in that original proceeding both the bona fides of residence and the effect, if any, of the New York separate maintenance decree as a bar to the cause of action for divorce. Res judicata is one of many defenses which must be affirmatively pled under settled Florida practice. (Rule 1.8 (d) of the Florida Rules of Civil Procedure) Petitioner waited for ten (10) years and the death of the original plaintiff to make her claim in the court of rendition. What the petitioner, in fact, objects to does not involve a federal question regarding the operation and effect of the full faith and credit clause of the United States Constitution, but the substantive and procedural law of Florida regarding direct attack upon final decrees that have long since passed into repose. The petitioner would, apparently, like litigation to be never ending. There is no conceivable constitutional objection to a state establishing substantive and procedural rules of law which give finality to judgments and decrees in the court of rendition. This is not a *Williams* I and II type case where the courts of a sister state, under the full faith and credit clause of the United States Constitution, may make inquiry into the foundations for jurisdiction of the court of rendition. This case represents concern and dissatisfaction by the petitioner with the settled law of the state of rendition regarding direct attack upon ancient decrees.

Petitioner has taken the untenable position that assuming the validity of the Florida divorce decree, she is, nevertheless, entitled to dower in her deceased husband's estate because she received alimony payments up to the time of his death pursuant to a New York separation decree. Petitioner cites, as authority, the recent decision of *Durfee* v. *Duke*, 275 U.S. 106, 84 S. Ct. 242. That case has no bearing on the case at bar. In that case, this Court simply held

that a plea of res judicata, based on the fact that a Nebraska court adjudicated, between the same parties, the identical issues presented in the Missouri proceeding, required the District Court in Missouri to grant full faith and credit to the Nebraska determination. In this case, the petitioner, with notice of the Florida divorce proceeding in 1952, failed to appear and assert the alleged affirmative defense that the New York separation decree was res judicata to the cause of action for divorce. Actually, it is settled, even under the authorities cited by the petitioner, that the courts of one state may properly grant a divorce based on constructive service of process and sever the marital status of the parties either before or after the courts of another state have adjudicated the wife's right to alimony and support based on personal service of process. *Estin* v. *Estin,* 334 U.S. 545, 68 S. Ct. 1213; *Armstrong* v. *Armstrong,* 350 U.S. 568, 76 S. Ct. 629; and *Pawley* v. *Pawley,* (Fla., 1950) 46 So.2d 464. Each of the cited cases recognize what is commonly known as the divisible divorce concept which embodies the above-stated principle. Petitioner, somehow, has confused and distorted the divisible divorce theory by refusing to recognize that dower flows as an incident of the marital status. Inchoate dower is born in marriage and dies in divorce. For dower to become consummate, a husband must die married. The interposition of divorce between marriage and death terminates dower. The fallacy in plaintiff's argument is that an adjudication of a wife's right to alimony and the payment of alimony of necessity requires the continued relationship of husband and wife. In fact, most frequently in divorce litigation, the final decree severs the bonds of matrimony, terminates all of the incidents of the relationship of husband and wife, including that of dower; but, specifically, provides for the continued support of the wife in the form of alimony payable by the former husband until the death of either of the parties or

the earlier remarriage of the wife. The so called divisible divorce concept merely allows the courts of one state, based on personal service of process, to adjudicate a wife's right to alimony either before or after the courts of another state have adjudicated the issue of divorce and discontinued thereby the status of husband and wife, based only on constructive service of process. The right to continue to receive alimony payments is, of course, in no wise dependent upon the continued relationship of husband and wife and can not be affected by a divorce decree based on constructive service of process. These are the legal principles which governed and controlled the relationship between Sol Simons and the petitioner up to the time of his death. The petitioner had a New York separation decree based on personal service, and the Florida divorce decree severed the relationship of husband and wife based on constructive service of process.

That divorce terminates dower is a principle of universal recognition. Exemplary of that recognition in Florida is the following:

> "A final decree of divorce puts an end to a wife's right of dower and is a complete defense to any claim for dower at the death of the husband. This is true regardless of which spouse secures the divorce. This rule rests on the evident fact that when the marriage relation is terminated by divorce, the woman ceases to be the wife of the man and on his death does not become his widow." 11 Fla. Jur., *Dower*, Section 15, at p. 46.

The precise question of Florida law presented by petitioner that dower is not cut off by a divorce decree, based on constructive service of process, was totally rejected by the Supreme Court of Florida in *North* v. *Ringling*, 149 Fla. 739, 7 So.2d 476. The divorce decree involved in that case

was founded on constructive service of process. (See *Ringling* v. *Ringling*, 117 Fla. 423, 158 So. 125) After the husband's death, the wife sought to set aside the final decree of divorce by the vehicle of a bill in the nature of a bill of review in order to clear the way for a dower claim against the dead husband's estate. That is exactly what petitioner sought to do in this case. The pertinent language of the Florida Supreme Court's decision that dower had been terminated by the decree of divorce based on constructive service of process reads as follows (7 So.2d at 481):

> "In the absence of statute saving it, a final decree of divorce puts an end to the wife's right of dower and is a complete defense to any claim for dower at the death of the husband. This is true regardless of which spouse secures the divorce. In the case at bar, no claim for dower was asserted at the time of the final decree of divorce, nor was it ever mentioned until after the death of John Ringling. It is now attempted to be reached by bill in the nature of a bill of review."

There is no merit whatever to the petitioner's contention that divorce in Florida does not end dower.

CONCLUSION

The respondent submits that a writ of certiorari should not be granted in this cause for the following reasons:

1. The petitioner's brief is riddled with inaccuracies, which, under United States Supreme Court Rule 23 (4), is sufficient reason for denying the petition.

2. The petitioner has failed to specify in her petition the manner in which or the stage of the proceedings in either the court of first instance or the appellate court at

which the alleged federal question was raised. The reason petitioner failed to comply with United States Supreme Court Rule 23 1(f) is that the alleged federal question was not raised in the court of first instance and was only interjected in a vague and flimsy manner on petition for rehearing in the District Court of Appeal, in and for the Third District of Florida. Consequently, the federal question, if any exists, was neither timely nor properly raised; thus depriving this court of jurisdiction.

3. There is no federal question involved. The only legal issues involved in this litigation concern the substantive and procedural laws of the State of Florida, as the Court of rendition, pertaining to direct attacks upon final decrees in chancery which have passed into repose.

4. That there are no special and important reasons for the issuance of a writ of grace in this cause as contemplated by United States Supreme Court Rule. 19. The record demonstrates that the inter-relation of the 1946 New York separate maintenance decree and the 1952 Florida divorce decree operated and functioned in strict compliance with the past decisions of this Court in the cases of *Estin* v. *Estin, supra,* and *Armstrong* v. *Armstrong, supra.*

Wherefore, the respondent respectfully requests that certiorari be denied.

Respectfully submitted,

MARION E. SIBLEY
Attorney for Respondent
605 Lincoln Road
Miami Beach, Florida 33139

CERTIFICATE OF SERVICE

The Undersigned Certifies that three (3) true and correct copies of the above and foregoing Brief In Opposition To Petition For Writ Of Certiorari were furnished by mail, by depositing same in a United States mailbox with first class postage prepaid, addressed to counsel of record for the petitioner, William Gresham Ward, 1240 duPont Building, Miami, Florida 33131, on this 21 day of August, 1964.

.....

MARION E. SIBLEY.

APPENDIX

APPENDIX

THIS RECORD COMPLETED AND FILED IN THE CLERK'S OFFICE THIS MAY 9th, 1963 TO BE RETAINED HERE FOR THE USE OF ATTORNEYS UNTIL THE TIME WHEN SAME WILL BE TRANSMITTED TO THE DISTRICT COURT OF APPEAL, THIRD DISTRICT.

E. B. Leatherman,
Clerk Circuit Court
By R. M. Williams

ORIGINAL RECORD

OF THE PROCEEDINGS IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT, IN AND FOR DADE COUNTY, FLORIDA.

IN CHANCERY,

NO. 62C 1980

IN THE CASE OF
LUCY C. SIMONS, a widow,
Plaintiff,

-vs-

MIAMI BEACH FIRST NATIONAL BANK, a banking institution organized and existing under the laws of the United States, with its principal place of business in the City of Miami Beach, Dade County, Florida, as Executor of the Estate of SOL SIMONS, deceased.
Defendant.

THEREIN LATELY PENDING.

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Date of Filing	Kind of Instrument	Pages
Feb. 23, 1962	Complaint together with Certain Instruments, attached thereto:	1-22
	EXHIBIT I: Copy of Petition Relative to Claim of Dower, in the Judge's Court, Dade County, Florida, Probate No. 51039-B	(Pg. 12-13)
	EXHIBIT 1: Copy of Motion to Dismiss Cause from District Court Southern District of Florida Miami Division, case No. 11,082-M-CIVIL	(Pg. 14)
	EXHIBIT 2: Final Decree in Chancery Case No. 148091-E	(Pg. 15)
	EXHIBIT 3: Decision of the SUPREME COURT, NEW YORK COUNTY, Special Term, Part IV, November 25, 1946 before Mr. Justice James B. M. McNalley (copy)	(Pgs. 16-22)

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Mar. 2, 1962	Summons issued together with original return of service on Miami Beach First National Bank	23
Mar. 16, 1962	Motion to Dismiss	24
Mar. 16, 1962	Motion for Summary Final Decree, together with Certified copy of Election to Take Dower, in the County Judges' Court, Dade County, Florida, In Probate No. 51039-B, attached thereto	25- 27
Mar. 16, 1962	Notice of Hearing (Special Appointment)	28- 29
Mar. 23, 1962	Affidavit (Lucy C. Simons)	30- 31
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Apr. 20, 1962	Notice of Taking Deposition	34- 35
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Apr. 30, 1962	Answer	41- 46
Apr. 30, 1962	Notice of Hearing (Motion Calendar)	47- 48
May 1, 1962	Letter dated April 30, 1962 from Montague Rosenberg to E. B. Leatherman, together with attached Receipt No. 9742 dated May 1, 1962 for check on Cost Bond from E. B. Leatherman, in the sum of $100.00	49- 50
May 4, 1962	Protective Order	51

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	Deposition of Lucy C. Simons	53- 97
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June 5, 1962	Motion for Protective Order, together with copies of letters from Irving B. Levenson to Ward & Ward, dated May 3, 1962, and from Ward & Ward to Irving B. Levenson, dated May 17, 1962, attached thereto	99-103
June 5, 1962	Notice of Hearing (Motion Calendar)	104-105
June 8, 1962	Protective Order	106
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July 9, 1962	Order Setting Cause for Final Hearing	118
July 12, 1962	Objection of Plaintiff to Request for Admissions	119-120
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Mar. 18, 1963	Cost Decree	210-211
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	Deposition of Jerome Mayer and Envelope attached thereto	443-459
	Deposition of Sadie Miner and Envelope attached thereto	460-479
	Deposition of Edgar A. Mandeville and Envelope attached thereto	480-492
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STATE OF FLORIDA)
)
COUNTY OF DADE)

I, E. B. LEATHERMAN, Clerk of the Circuit Court for the County of Dade, State of Florida, DO HEREBY CERTIFY that the foregoing Pages 1 to 859, inclusive, comprising Volumes I through VI, contain a correct copy of the judgment in the case of LUCY C. SIMONS, a widow, Plaintiff, against MIAMI BEACH FIRST NATIONAL BANK, a banking institution organized and existing under the laws of the United States, with its principal place of business in the City of Miami Beach, Dade County, Florida, as Executor of the Estate of SOL SIMONS, deceased, Defendant, and a true and correct recital and inclusion of all of such original papers and proceedings in said cause as appear from the records and files of my office that have been directed to be included in said record by the directions furnished me.

(Pages 493 to 850, inclusive, embrace the transcribed notes of the reporter as made at the trial and certified to me by him, and bound under separate volume.)

(Pages 851 to 859, inclusive, embrace certified copies of the appeal papers to be retained by the District Court.)

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Seal of said Court this 15th day of May, A. D., 1963.

E. B. Leatherman
Clerk Circuit Court

By .....
Deputy Clerk

STATE OF FLORIDA)
)
COUNTY OF DADE)

I, E. B. LEATHERMAN, Clerk of the Circuit Court in and for Dade County, Florida, DO HEREBY CERTIFY that the foregoing pages numbered 851 to 859, inclusive, contain true and correct copies of appeal papers numbered to coincide with the original papers filed in the case of LUCY C. SIMONS, a widow, Plaintiff, against MIAMI BEACH FIRST NATIONAL BANK, a banking institution organized and existing under the laws of the United States, with its principal place of business in the City of Miami Beach, Dade County, Florida, as Executor of the Estate of SOL SIMONS, deceased, Defendant, Chancery Case No. 62C 1980, being as follows, to wit:

Notice of Appeal filed March 26, 1963, and recorded March 28, 1963, in Chancery Order Book 1668, Page 321,

Final Decree filed January 30, 1963, and recorded January 31, 1963, in Chancery Order Book 1654, Page 269,

Assignments of Error filed April 5, 1963,

Directions to the Clerk filed April 5, 1963,

Cross Direction to the Clerk filed April 9, 1963,

according to the records and files of my office.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Seal of said Court this 15th day of May, A.D., 1963.

E. B. Leatherman
Clerk Circuit Court

By .....
Deputy Clerk

STATE OF FLORIDA)
)
COUNTY OF DADE)

I, E. B. LEATHERMAN, Clerk of the Circuit Court for the County of Dade, State of Florida, DO HEREBY CERTIFY that the enclosed Exhibits are the Plaintiff's and Defendant's Exhibits, being as follows, to wit:

PLAINTIFF'S EXHIBITS

1. Certificate of Judges Decision of the Supreme Court of the State of New York
2. Certificate of Hearings of the Justice of the Supreme Court of the State of New York & (Certificate of Findings)
3. Chancery Case No. 148091 in Circuit Court of Florida, Dade County
4. Copy of Transcript of Minutes of Proceedings from the Supreme Court of the State of New York, before the Hon. David L. Weil, Official Referee, Jan. 29, 52.
5. Letter dated April 3, 1952, from Millard & Greene to Sol Simons
6. Letter dated from Sol Simons to Myron J. Greene
7. Page 1490 from N.Y. City Phone Directory (Manhattan)
8. Page 1091 from N.Y. City Phone Directory (Queens)

DEFENDANT'S EXHIBITS

A. Declaration of Domicile and Citizenship, Dade County, Florida, for Sol Simons

B. Copy of Renewal Apartment Lease dated Sept. 21, 1959, between Sandpiper Villas and Sol Simons

C. Letter dated 2/4/52 from Sol to Dear Seymour

D. Letter dated 2/20/52 from Sol to Dear Seymour

E. Composite of Gasoline bills to Sol Simons

F. Certified copy of Certificate of Title Application No. 2947596, State of Florida

G. Paid Bill from Nolan Brown Motors to Sol Simons, 3-17-52

H. Certificate of Incorporation of Fruit Sales Corporation, Inc., Office of Secretary of State of Florida, and copy of Certificate of Incorporation, etc., attached thereto

I. N. Y. State Income Tax Resident Return, 1951 (copy)

J. Composite of U. S. Income Tax Returns (copies), years 1952 to 1960, inclusive for Sol Simons

K. Letter from Metropolitan Dade County, Florida, Tax Collection Div. dated July 19, 1962

L. 4 pages of photo-copies of various checks

M. Various Correspondence Files from Sol Simons, etc.

N. Letters from Dorothy Newhoff comprising 3 Pd. Bills for Sol Simons, dated March 26, 1952, Apr. 18, 1952 and May 2, 1952, respectively (Public Stenographer)

O. Various Correspondence Files from Sol Simons, etc.

P. Handwritten letter dated Nov. 20, 1957, from Lucy to Dear Sol

Q. 3 Letters from Millard & Greene to Sol Simons, dated November 19, 1951, November 26, 1951 and November 27, 1951, respectively

R. Certified copy of Election to Take Dower, from County Judges' Court, Dade County, Florida, In Probate, No. 51039-B

S. Copy of Last Will and Testament of Sol Simons

as reflected by the Judge's file stamps appearing thereon in the case of LUCY C. SIMONS, a widow, Plaintiff, against MIAMI BEACH FIRST NATIONAL BANK, a banking institution organized and existing under the laws of the United States, with its principal place of business in the City of Miami Beach, Dade County, Florida, as Executor of the Estate of SOL SIMONS, deceased, Defendant, Chancery Case No. 62C 1980, according to the records and files of my office.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Seal of said Court this 15th day of May, A.D., 1963.

E. B. Leatherman
Clerk Circuit Court
By /s/ R. M. Williams
Deputy Clerk